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NO. 83-498

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR APPELLANTS

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Reply to Local 54's Statement of the Case

In their brief and supplemental appendix, the Hotel and Restaurant Employees and Bartenders International Union Local 54 *et al.* (hereinafter referred to as "Local 54") call the Court's attention to certain background relating to the State's investigation of the union. The Appellant Division of Gaming Enforcement (hereinafter referred to as "the Division") had deemed these matters to be largely irrelevant to the legal issues before this Court. Nevertheless, in view of Local 54's treatment of this material, certain ambiguities and omissions should be clarified.

First, Local 54 suggests that Section 86(b) of the New Jersey Casino Control Act, N.J. Stat. Ann. §5:12-86(b) (West Supp. 1983-1984) (J.S. App. 248a),[1] which disqualifies an individual for failing to provide information required by the Act, is somehow "central" to this case. Local 54 Brief at 3. But the disqualifications found by the Casino Control Commission (hereinafter referred to as "the Commission") were not based upon Section 86(b); rather, the president and a member of the executive committee of Local 54 were disqualified for operating their union under the influence of organized crime in violation of Section 86(f) (J.S. App. 171a-178a), and a union agent was disqualified on the basis of his conviction for extortion while acting as a public official, which constituted a disqualifying criterion under Section 86(c) (J.S. App. 193a-196a).

[1] Throughout this reply brief, references to the Joint Appendix to the Jurisdictional Statements will be given in the form "J.S. App. 1a" etc. The Brief and Supplemental Appendix for the Appellees Local 54 *et al.* will be referred to as "Local 54 Brief" and "Local 54 Supp. App." respectively. "Division Brief" will denote the Brief for the Appellants Division of Gaming Enforcement *et al.*

No official of Local 54 has ever been disqualified for a failure to cooperate with the Division's investigation.[2]

Second, Local 54 chronicles at some length the unfortunate illness of Robert Lumio, the union's former Secretary-Treasurer, extending through the period of the Division's investigation and concluding with Lumio's death in June 1981. Local 54 Brief at 5-7. It does not follow from this background, however, that it was inappropriate for the Division to make efforts to verify the fact and extent of Mr. Lumio's medical problems, to seek to interview him at such time as his health permitted, or ultimately to object to his qualifications on a variety of grounds (see Plaintiffs' Exhibit 2). It should be noted that the basis for one of the disqualifications alleged by the Division with regard to Mr. Lumio—that he had numerous documented associations with individuals involved in organized crime—was ultimately sustained by the Commission (J.S. App. 143a, 148a-149a, 151a-152a, 155a-156a).[3]

Third, the union implies some impropriety in the procedure by which the Division sought to conduct investigative interviews of certain officers of Local 54 without the continuous presence of counsel, but with counsel available for consultation outside the interview room. Local 54

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[2] The Division did, in its initial report to the Casino Control Commission, allege what it viewed as violations of Section 86(b) by two officers of Local 54 (Plaintiffs' Exhibit 2). This issue was deleted prior to the Commission hearing, however, thus no factual determination on the question has ever been made.

[3] Although Lumio's death prior to the Commission hearing had rendered the question of Lumio's own disqualification moot, information concerning Lumio was nonetheless considered by the Commission to the extent such information was germane to the disqualification of other officials of Local 54 (see J.S. App. 154a-156a).

Brief at 5-7; Local 54 Supp. App. at 1a, 46a. Based in part on the practical consideration that the presence of advisors to witnesses might unduly encumber an investigatory proceeding, this Court itself has upheld a procedure virtually identical to that proposed by the Division herein, in the context of civil investigations by a state fire marshal. *In re Groban,* 352 U.S. 330 (1957). *See also Hannah* v. *Larche,* 363 U.S. 420 (1960); *Anonymous* v. *Baker,* 360 U.S. 287 (1959); *cf. Minnesota* v. *Murphy,* 52 U.S.L.W. 4246, 4247 n. 3 (U.S., Feb. 22, 1984) (probationer had no federal right to have attorney present at meeting with probation officer). The Division's investigatory procedures have been specifically approved by the New Jersey courts as well. *In re Tufi Application,* 182 N.J. Super. 631, 642-643, 442 A. 2d 1080, 1086 (App. Div. 1982).

As a final matter, and contrary to any impression which might otherwise have been created, it is not beyond question that Frank Gerace, the president of Local 54, would have submitted to a Division interview *but for* the Division's insistence on following its established investigative procedures. See Local 54 Brief at 6-7. What is certain is that it ultimately required a grant of immunity from criminal prosecution to secure Mr. Gerace's pre-hearing deposition testimony (see J.S. App. 203a), and that when called as a witness by the Division at the public hearing before the Commission, Mr. Gerace declined to provide any substantive information, instead invoking his Fifth Amendment privilege against self-incrimination (J.S. App. 166a).[4]

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[4] During this period of time Mr. Gerace was represented by separate counsel, who assertedly advised him not to testify without immunity because Gerace was then the subject of a federal grand jury investigation (J.S. App. 132a, 168a).

In sum, as noted above, the Division considers the detailed factual background concerning its investigation of Local 54 to have little bearing on the question before this Court, *i.e.* whether N.J. Stat. Ann. §5:12-93 (West Supp. 1983-1984) (J.S. App. 246a-247a) is preempted by federal labor law. Nevertheless, to the extent such matters may be relevant, the complete record demonstrates that the Division's investigation of Local 54 and its officials, while sufficiently thorough to comport with the public interest, was not unfair, unreasonable or otherwise improper.

Reply to Local 54's Argument

I. Section 93 of the New Jersey Casino Control Act is not preempted by Section 7 of the National Labor Relations Act.

As reflected in their brief, the major premise of Local 54's argument is that Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. §157 (1976) (J.S. App. 235a), absolutely protects employees' choice of bargaining representatives from any state interference, and that *Hill* v. *Florida*, 325 U.S. 538 (1945), controls the Court's decision of the present case. This reply will confine itself to addressing the most significant errors in Local 54's analysis.[5]

At the outset, the Division accepts the principle that in situations where Congress has so ordained, conflicting state enactments must yield to federal law without regard to the relative importance of the state interest involved. Indeed, the Division has never contended otherwise. See

[5] As to all other issues, the Division will rely on its main brief on the merits.

Division Brief at 15-16. What we do contend, however, is that the depth of the State's interest in regulating certain conduct is of crucial import in determining whether Congress actually intended preemption of the state action in the first place where, as here with regard to Section 7 of the NLRA, the federal statute is completely devoid of explicit congressional direction as to its preclusive effect. Under such circumstances, prevailing notions of federalism dictate that the more compelling the State's interest in regulation as an exercise of its historical police powers, the less likely it becomes that Congress would preclude, merely by implication, the State's ability to act. This view, we submit, is the animating principle behind the "deeply rooted state interest" test set forth in *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 243-244, 247 (1959), and is fully consistent with the Court's most recent formulations of the preemption doctrine in the labor field. *See e.g., Belknap, Inc.* v. *Hale*, 103 S.Ct. 3172, 3176-3177 (1983); *Local 926, Int'l Union of Oper. Eng.* v. *Jones*, 103 S.Ct. 1453, 1458-1459 (1983).

Local 54's theory that Section 7 of the NLRA is absolute, and itself constitutes compelling congressional direction as regards state preemption, ignores certain fundamental facts. In the first place, as pointed out by Justice Frankfurter in his dissent in *Hill*, there is not a word in Section 7 or any other part of the NLRA which expressly bars a State from doing anything; employees' rights of organization receive explicit protection only from interference by *employers*, under Section 8 of the Act. 325 U.S. at 558-560. In effect, a congressional intent to preempt state interference with employees' Section 7 rights was simply read into the NLRA by the *Hill* majority. See 325 U.S. at 542; *id.* at 545 (Stone, C.J., concurring in part).

The Division is not arguing herein that Hill was wrongly decided on its facts, and the Court need not so hold. Our position, rather, is that Section 7 embodies what is at most an *implied* congressional preemptive intent, of intrinsically uncertain scope, so that preclusion of the type of general state legislation at issue in *Hill* does not necessarily dictate a corresponding bar to a law such as Section 93 of the Casino Control Act. The validity of this approach is confirmed in *DeVeau* v. *Braisted*, 363 U.S. 144, 152-153 (1960), in which Justice Frankfurter unequivocally stated that "the National Labor Relations Act does not exclude every state policy that may in fact restrict the complete freedom of a group of employees to designate 'representatives of their own choosing,'" and that the real question presented by such a case is whether "Congress, with a lively regard for its own federal labor policy, [would] find in this state enactment a true, real frustration, however dialectically plausible, of that policy."[6]

As a second consideration, Local 54's theory fails to account for the fact that, even in the *Hill* case itself, Chief Justice Stone, in an opinion concurring in part, indicated

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[6] *DeVeau* also provides the definitive response to the suggestion of Local 54 that, in evaluating the preemptive effect of Section 7 of the NLRA, this Court should not consider congressional actions subsequent to *Hill*, *i.e.* Congress' approval of the Waterfront Compact in 1953 and passage of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"):

> It would misconceive the constitutional doctrine of preemption—of the exclusion because of federal regulation of what otherwise is conceded state power—to decide this case mechanically on an absolute concept of free choice of representatives on the part of employees, *heedless of the light that Congress has shed for our guidance.* [363 U.S. at 153 (emphasis added)].

that the preemptive reach of Section 7 of the NLRA was not without its limits:

> I can find nothing in the National Labor Relations Act or its legislative history to suggest a Congressional purpose to withdraw the punishment of fraud or violence, or the violation of any state law otherwise valid, from the state's power merely because the state might subject the business agent of a labor union, who violates its law, to imprisonment, which would prevent his functioning as a bargaining agent for employees under the National Labor Relations Act. [325 U.S. at 544-545].

But the very recognition of an implied exception to the preemptive scope of Section 7 in an area of significant state interest suggests, as the Division urges, that other exceptions may be found where a State's interest is equally compelling.

Third, Local 54's argument entirely fails to take into account the fact that, between 1945 (when *Hill* was decided) and the present, this Court's own approach to preemption evolved from one weighted heavily in favor of federal preclusion to one amenable to the concurrent exercise of state regulatory authority.[7] As an example, in *Hill* itself, the Court regarded the mere existence of Section 7 of the NLRA as sufficient justification for ousting the State's legislation. 325 U.S. at 542. An identical ap-

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[7] *See generally* Note, The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court, 75 Colum. L. Rev. 623 (1975). Indeed, one commentator has specifically attributed the development of the law of preemption in the labor field to the time sequence in which the key issues came before the Court. Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1340 (1972).

proach to preemption was followed in *Amalgamated Ass'n of Street Employees* v. *Wisconsin Employment Rels. Bd.*, 340 U.S. 383 (1951), relied on so heavily by Local 54.

A transformation occurred in *DeVeau* v. *Braisted, supra,* in which Justice Frankfurter rejected any such absolutist view of preemption, finding instead that "[t]he doctrine of pre-emption does not present a problem of physics but one of adjustment because of the interdependence of federal and state interests and of the interaction of federal and state powers."[8] 363 U.S. at 152. In seeking to reconcile the operation of Section 8 of the Waterfront Commission Act with Section 7 of the NLRA, 363 U.S. at 152-153, Justice Frankfurter was employing the approach which has been followed by this Court in its most recent pre-emption decisions, *see, e.g., Silkwood* v. *Kerr-McGee Corp.*, 104 S. Ct. 615, 622-626 (1984), and which should be followed in the present case.

Finally, Local 54 expends some effort in attempting to demonstrate that Section 504(a) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §504(a) (1976) (J.S. App. 236a-237a), is really irrelevant to this case. At no point, however, do they explain why the more general provisions of Section 7 of the NLRA should take precedence over the later-enacted and much more specific terms of Section 504(a) of the LMRDA, which the union agrees do not preempt concurrent state regulation. Nor does Local 54 explain why Congress would take the self-contradictory action of affirmatively preserving in Section 603(a) of the LMRDA, 29 U.S.C. §523(a) (1976), state regulation which, at the same time, was rendered impermissible by another pro-

[8] This analysis echoed in its terms Justice Frankfuter's dissenting opinion in *Amalgamated Ass'n of Street Employees, supra,* 340 U.S. at 403.

vision of federal law. The more reasonable inference to be drawn from the interplay between Sections 504(a) and 603(a) of the LMRDA, and Section 7 of the NLRA, is that the later and more specific terms of the LMRDA—particularly the anti-preemption provisions thereof—should control the more general terms of the NLRA. In so holding, this Court would be following the approach adopted most recently in *NLRB* v. *Bildisco & Bildisco*, 52 U.S. L.W. 4269 (U.S., Feb. 22, 1984), in which the more specific provisions of the federal bankruptcy code were held to authorize employer actions which would have constituted unfair labor practices under the more general provisions of the NLRA.

II. Section 86 of the New Jersey Casino Control Act is designed to prevent organized criminal infiltration and other corruption of the gaming industry, not to prevent vigorous labor representation.

As pointed out in the Division's brief, Section 86 of the New Jersey Casino Control Act (J.S. App. 248a-255a) on its face disqualifies an individual only for criminal or *quasi*-criminal conduct, or for illegal attempts to thwart an investigative inquiry into such conduct. Division Brief at 4-5 & n. 3, 37. At various points in Local 54's brief, the union advances for the first time in these proceedings the assertion that the disqualification provisions of Section 86 actually sweep so broadly as to empower the Commission to bar "any union officer whose militancy is seen as a threat to tourism."[9] Local 54 Brief at 18-19, 28. So

[9] Before the District Court, Local 54 raised two entirely different arguments as to the overbreadth and vagueness of Section

(Footnote continued on following page)

that the record is clear, although declarations of public policy set forth within the New Jersey Casino Control Act do make reference to the promotion of tourism, N.J. Stat. Ann. §§5:12-1(b)(1), (2), (3), (4) and (5) (West Supp. 1983-1984), Section 86 of the Act—as applied to labor officials through Section 93—is designed to implement a totally separate law enforcement objective, namely, the exclusion from participation in the gaming industry of persons having known criminal records, habits, or associations. See N.J. Stat. Ann. §§5:12-1(b)(6), (7), (9), (13) and (15) (West Supp. 1983-1984); *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danzinger,* 536 F. Supp. 317, 321-323 (D.N.J. 1982) (J.S. App. 81a-87a). The notion that union leaders could be disqualified under Section 86 of the Casino Control Act merely for "vigorously champion[ing] the interests of the employees they represent," Local 54 Brief at 19, is unsupportable and spurious.

(Footnote continued from preceding page)

86, both of which were rejected. *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danzinger,* 536 F. Supp. 317, 335-338 (D.N.J. 1982) (J.S. App. 115a-122a). These overbreadth and vagueness contentions were not considered by the Court of Appeals, *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danziger,* 709 F. 2d 815, 833 (3d Cir. 1983) (J.S. App. 37a), and are not before this Court.

III. The otherwise valid operation of Section 93 of the New Jersey Casino Control Act cannot be nullified merely because Local 54 also represents some non-casino industry employees.

The persistent attempts of Local 54 to interpose its non-casino industry members as a shield, to prevent the application of Section 93 of the Casino Control Act to the union's casino industry members, see Local 54 Brief at 4, 21-22, must be unavailing. As a discrete group, non-casino workers would be beyond the reach of Section 93, and could select any individuals they desired to serve as their bargaining representatives. But having voluntarily chosen for their own benefit to ally themselves with a casino industry labor organization and that organization's leadership, the non-casino workers must take the bitter with the sweet. Any contrary rule would produce the anomalous result of permitting all unions involved in the casino industry to immediately and totally nullify the otherwise valid operation of Section 93 merely by absorbing some non-casino members to serve, in effect, as hostages. Should this Court uphold the validity of Section 93, the non-casino members of Local 54 can be expected to take appropriate action in their own best interests, as provided for by federal labor law.

CONCLUSION

For all of the reasons set forth herein and in our brief on the merits, the judgment of the Court of Appeals, holding Section 93 of the New Jersey Casino Control Act preempted by federal labor law, should be reversed.

Respectfully submitted,

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